

AMENDED IN SENATE MAY 10, 2011
AMENDED IN SENATE APRIL 25, 2011
AMENDED IN SENATE APRIL 4, 2011
AMENDED IN SENATE MARCH 24, 2011

SENATE BILL

No. 761

Introduced by Senator Lowenthal

February 18, 2011

An act to add Section 22947.45 to the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 761, as amended, Lowenthal. Computer spyware.

Existing law, the Consumer Protection Against Computer Spyware Act, prohibits a person or entity other than the authorized user of computer software from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto the computer of a consumer in this state and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally deceptive means, personally identifiable information, as defined, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disabling of software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, or (6) through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer.

Existing law establishes the Office of Privacy Protection for specified purposes relating to protecting the privacy rights of consumers.

This bill would, no later than July 1, 2012, require the Attorney General, in consultation with the Office of Privacy Protection, to adopt regulations that would require a covered entity, defined as a person or entity doing business in California that collects, uses, or stores online data containing covered information from a consumer in this state, to provide a consumer in California with a method to opt out of that collection, use, and storage of such information. The bill would specify that such information, includes, but is not limited to, the online activity of an individual and other personal information. The bill would subject these regulations to certain requirements, including, but not limited to, a requirement that a covered entity disclose to a consumer certain information relating to its collection, use, and storage information practices. The bill would, to the extent consistent with federal law, prohibit a covered entity from selling, sharing, or transferring a consumer's covered information, *except as specified*. The bill would make a covered entity that willfully fails to comply with the adopted regulations liable to a consumer in a civil action for damages, as specified, and would require such an action to be brought within a certain time period.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 22947.45 is added to the Business and
- 2 Professions Code, to read:
- 3 22947.45. (a) For the purposes of this section, the following
- 4 definitions shall apply:
- 5 (1) "Covered entity" means a person or entity doing business
- 6 in California that collects, uses, or stores online data containing
- 7 covered information from a consumer in this state. "Covered entity"
- 8 shall not include any of the following:
- 9 (A) The federal government or any instrumentality of the federal
- 10 government.
- 11 (B) The government of any state or any instrumentality of state
- 12 government.
- 13 (C) Any local government or instrumentality of local
- 14 government.

1 (D) Any person who can demonstrate that he or she does all of
2 the following:

3 (i) Stores covered information from or about fewer than 15,000
4 individuals.

5 (ii) Collects covered information from or about fewer than
6 10,000 individuals during any 12-month period.

7 (iii) Does not collect or store sensitive information.

8 (iv) Does not use covered information to study, monitor, or
9 analyze the behavior of individuals as the person's primary
10 business.

11 (2) (A) "Covered information" means, with respect to an
12 individual, any of the following that is transmitted online:

13 (i) The online activity of the individual, including, but not
14 limited to, the Internet Web sites and content from Internet Web
15 sites accessed; the date and hour of online access; the computer
16 and geolocation from which online information was accessed; and
17 the means by which online information was accessed, such as, but
18 not limited to, a device, browser, or application.

19 (ii) Any unique or substantially unique identifier, such as a
20 customer number or Internet Protocol address.

21 (iii) Personal information including, but not limited to, a name;
22 a postal address or other location; an e-mail address or other user
23 name; a telephone or fax number; a government-issued
24 identification number, such as a tax identification number, a
25 passport number, or a driver's license number; or a financial
26 account number, or credit card or debit card number, or any
27 required security code, access code, or password that is necessary
28 to permit access to an individual's financial account.

29 (B) "Covered information" shall not include the title, business
30 address, business e-mail address, business telephone number, or
31 business fax number associated with an individual's status as an
32 employee of an organization, or an individual's name when
33 collected, stored, used, or disclosed in connection with that
34 employment status; or any information collected from or about an
35 employee by an employer, prospective employer, or former
36 employer that directly relates to the employee-employer
37 relationship.

38 (3) (A) "Sensitive information" means any of the following:

39 (i) Any information that is associated with covered information
40 of an individual and relates directly to that individual's medical

1 history, physical or mental health, or the provision of health care
2 to the individual; race or ethnicity; religious beliefs and affiliation;
3 sexual orientation or sexual behavior; income, assets, liabilities,
4 or financial records, and other financial information associated
5 with a financial account, including balances and other financial
6 information, except when financial account information is provided
7 by the individual and is used only to process an authorized credit
8 or debit to the account; or precise geolocation information and any
9 information about the individual's activities and relationships
10 associated with that geolocation.

11 (ii) An individual's unique biometric data, including a
12 fingerprint or retina scan, or social security number.

13 (iii) Information deemed sensitive information pursuant to
14 regulations adopted by the Attorney General under subparagraph
15 (B).

16 (B) The Attorney General in consultation with the Office of
17 Privacy Protection may, by regulations adopted pursuant to
18 subdivision (b), modify the scope or application of the definition
19 of "sensitive information" as necessary to promote the purposes
20 of this act. In adopting these regulations, the Attorney General
21 shall consider the purpose of collecting the information and the
22 context in which the information is used; how easily the
23 information can be used to identify a specific individual; the nature
24 and extent of authorized access to the information; an individual's
25 reasonable expectations under the circumstances; and adverse
26 effects that may be experienced by an individual if the information
27 is disclosed to an unauthorized person.

28 (b) (1) No later than July 1, 2012, the Attorney General, in
29 consultation with the Office of Privacy Protection, shall adopt
30 regulations that would require a covered entity doing business in
31 California to provide a consumer in this state with a method for
32 the consumer to opt out of the collection or use of any covered
33 information by a covered entity.

34 (2) The regulations shall do the following:

35 (A) Include a requirement for a covered entity to disclose, in a
36 manner that is easily accessible to a consumer, information on the
37 *covered entity's* collection, use, and storage of information
38 practices, how the entity uses or discloses ~~that~~ *covered* information,
39 and the names of the persons to whom that entity would disclose
40 ~~that~~ *covered* information.

1 (B) Prohibit the collection or use of covered information by a
2 covered entity for which a consumer has opted out of such
3 collection or use, unless the consumer changes his or her opt-out
4 preference to allow the collection or use of that information.

5 (3) The regulations may do the following:

6 (A) Include a requirement that a covered entity provide a
7 consumer with a means to access the covered information of that
8 consumer and the data retention and security policies of the covered
9 entity in a format that is clear and easy to understand.

10 (B) Include a requirement that some or all of the regulations
11 apply with regard to the collection and use of covered information,
12 regardless of the source.

13 (4) The regulations shall not interfere with, affect, or prohibit
14 a commercial relationship between a consumer and a covered entity
15 where the consumer expressly opts in to the collection and use of
16 his or her covered information by the covered entity for the purpose
17 of engaging in that commercial relationship. However, if a majority
18 of the covered entity's revenue is derived from online advertising
19 and marketing, the regulations may regulate and affect such a
20 commercial relationship.

21 (5) The Attorney General may exempt from some or all of the
22 regulations required by this section certain commonly accepted
23 commercial practices, including the following:

24 (A) Providing, operating, or improving a product or service
25 used, requested, or authorized by an individual, including the
26 ongoing provision of customer service and support.

27 (B) Analyzing data related to use of the product or service for
28 purposes of improving the products, services, or operations.

29 (C) Basic business functions, such as, but not limited to,
30 accounting, inventory and supply chain management, quality
31 assurance, and internal auditing.

32 (D) Protecting or defending rights or property, including, but
33 not limited to, intellectual property, against actual or potential
34 security threats, fraud, theft, unauthorized transactions, or other
35 illegal activities.

36 (E) Preventing imminent danger to the personal safety of an
37 individual or group of individuals.

38 (F) Complying with a federal, state, or local law, regulation,
39 rule, or other applicable legal requirement, including, but not

1 limited to, disclosures pursuant to a court order, subpoena,
2 summons, or other properly executed compulsory process.

3 (G) Any other category of operational use specified by the
4 Attorney General in regulations adopted pursuant to this
5 subdivision that is consistent with the purposes of this act.

6 (c) Notwithstanding any other provision of law and to the extent
7 consistent with federal law, no covered entity shall sell, share, or
8 transfer a consumer's covered information, *except that the*
9 *regulations adopted by the Attorney General shall permit a covered*
10 *entity to enter into a commercial transaction with a consumer and*
11 *to collect, store, and share that consumer's covered information*
12 *solely to complete that transaction.*

13 (d) A covered entity that willfully fails to comply with
14 regulations promulgated by the Attorney General pursuant to
15 subdivision (b) with respect to any individual is liable to that
16 individual in a civil action brought in a California court of
17 appropriate jurisdiction in an amount equal to the sum of the greater
18 of any actual damages, but in no event less than one hundred
19 dollars (\$100) or more than one thousand dollars (\$1,000), and
20 such amount of punitive damages as the court may allow. In the
21 case of any successful action under this section, the covered entity
22 shall be liable to the individual for the costs of the action together
23 with reasonable attorney's fees as determined by the court. A civil
24 action under this section shall not be commenced later than two
25 years after the date upon which the claimant first discovered or
26 had a reasonable opportunity to discover the violation.